IN THE

Supreme Court of the United States

SEP 16 1944
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1944.

No. 475

THE PENFIELD COMPANY OF CALIFORNIA,

Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals and Brief in Support Thereof.

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SUBJECT INDEX.

PAGE

Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals and Brief in Support Thereof 1

A.

Jurisdictional statement 2

B.

Questions presented by this appeal 2

C.

The importance of the questions involved 3

D.

Statutes involved 3

E.

Statement of the case 4

Grounds for granting the writ of certiorari 9

Brief in Support of the Petition for Writ of Certiorari 11

The contract was not within the jurisdiction of the S. E. C. 16

The District court erred therefore in holding that bottling contracts of The Penfield Company of California were transactions in securities as defined in Section 2(1) of the Securities Act of 1933 and therefore conferred jurisdiction upon the Securities and Exchange Commission 19

PAGE

The District Court erred in holding that transactions in distillers' whiskey warehouse receipts and matters relating to alcohol were transactions within the meaning of Section 2(1) of the Securities Act as Amended in 1933..... 20

The District Court erred in holding that each of the twenty items was within the scope and jurisdiction of the Securities Act giving the Commission power to investigate them..... 21

The District Court erred in holding that the provisions of Section 19(b) of the Securities Act of 1933 as amended and supplemented by the provisions of Section 22(b) of said Act, inherently and as construed and applied in this case, are not invalid and unconstitutional because they delegate judicial powers to the Securities and Exchange Commission in violation of Article III of the Constitution of the United States, and deprive the District Court of judicial functions as to what matters are or are not relevant or material to the inquiry 23

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
A. Wiedemann Co. v. Digges, 21 Cal. App. 342, 131 Pac. 882	20
Annenberg v. Roberts, 333 Pa. 214	22
Bishop v. Fulkerth, 68 Cal. 607, 10 Pac. 122	20
Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746	13, 15, 21
Cavallaro v. Texas etc. Ry. Co., 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94	20
Cobbledick v. United States, 309 U. S. 323, 84 L. Ed. 783	2
Counselman v. Hitchcock, 142 U. S. 547, 35 L. Ed. 1110	15
Cudahy Packing Co. v. Holland, 315 U. S. 357, 86 L. Ed. 895	12
Davis v. Russell, 52 Cal. 611, 28 Am. Rep. 647	20
Federal Trade Commission v. American Tobacco Co., 264 U. S. 298	21
Garoutte v. Williamson, 108 Cal. 135, 41 Pac. 35	20
Go-Bart Imp. Co. v. United States, 282 U. S. 344, 75 L. Ed. 374	13
Gouled v. United States, 255 U. S. 298, 65 L. Ed. 647	13
Grau v. United States, 287 U. S. 124, 77 L. Ed. 212	13, 14
Hale v. Henkel, 201 U. S. 43, 55 L. Ed. 873	21
Head v. Providence Insurance Co., 2 Cranch. 156	22
Innes v. Securities and Exchange Commission, 80 L. Ed. 1015	23
Interstate Com. Commission v. Brimson, 154 U. S. 447	21, 23
Jones v. Securities and Exchange Commission, 298 U. S. 1, 80 L. Ed. 1015	21
Lewis v. Creasey Corp., 198 Ky. 407, 248 S. W. 1046	19
Lowell Sun Co. v. Fleming, 120 Fed. (2d) 213, 86 L. Ed. 1191	12
Michelson v. Painter, 35 Cal. 705	22

PAGE

Pacific Railway Commission v. Stanford, 32 Fed. Rep. 241 23

People v. Davenport, 21 Cal. App. (2d) 252 18

People v. Gunn, 85 Cal. 238 22

Stark v. Wickard, 88 L. Ed. 511 22

Zottman v. S. F., 20 Cal. 102 22

STATUTES.

Civil Code, Sec. 1858b 20

Constitution of the United States, Fourth Amendment 3, 9, 15, 16

National Prohibition Act, Title 2, Sec. 25 14

Securities and Exchange Act, Sec. 2(1) 3

Securities and Exchange Act, Sec 19(b) 3, 6, 11, 12

Securities and Exchange Act (15 U. S. C., Sec. 77v(a)) 2

Securities and Exchange Act, Sec. 22(b) (15 U. S. C., Sec. 77v (b)) 2, 3

United States Codes, Title 28, Secs. 225, 347 2

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Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals and Brief in Support Thereof.

To the Honorable Chief Justice and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, The Penfield Corporation of California, hereby prays that a writ of certiorari may be granted directing the Circuit Court of Appeal of the United States for the Ninth Circuit to certify to this Court, for review and determination, the case of The Penfield Company of California, a corporation, appellant, vs. the Securities and Exchange Commission, appellee, being cause No. 10487 in the United States Circuit Court of Appeals for the Ninth Circuit.

A.

Jurisdictional Statement.

Jurisdiction is conferred by Section 22(b) of the Securities Act of 1933, 15 U. S. C. 77v (b) and by Securities and Exchange Act, Title 15, Section 77v (a) and Title 28, Sections 225 and 347, U. S. Codes. See also *Cobbledick v. United States,* 309 U. S. 323, 330, 84 L. Ed. 783, 787.

The decision of the Circuit Court of Appeals was rendered June 30, 1944, by a majority of the court; a concurring opinion was filed by Judge Mathews July 19, 1944; a petition for rehearing was duly filed on July 25, 1944, and denied August 8, 1944 [R. 360-361].

B.

Questions Presented by This Appeal.

1. Is the Securities and Exchange Commission authorized to delegate its power of issuing subpoenas *duces tecum* to one of its investigators and to give that investigator authority to require the production of any books, papers, correspondence, memoranda, or other records, or must the Securities and Exchange Commission itself make a finding of "probable cause" and a finding that they deem the papers relevant or material to the inquiry?

2. Is such a delegated authority an unknown roving commission forbidden by the Fourth Amendment to the Constitution of the United States?

3. Is the act of Congress which gives the Securities and Exchange Commission authority to subpoena books, papers, correspondence, memoranda, or other records, a violation of Article III of the constitution of the United States which gives judicial functions only to the courts?

4. Are contracts for the bottling of whiskey (which must be done under an alcohol tax unit permit) securities within the meaning of Section 2(1) of the Securities Act of 1933 as amended?

5. Does the Securities and Exchange Commission have jurisdiction over dealings in alcohol bottling where that subject matter comes under the alcohol tax act?

C.
The Importance of the Questions Involved.

It is important that this honorable court grant certiorari because of the importance of the questions involved which have heretofore not been passed upon by this honorable court. There has been no construction of the Securities and Exchange Commission covering the particular sections here challenged except by the Ninth Circuit Court of Appeals and this is the first case which raises the particular issues here presented.

D.
Statutes Involved.

The statutes involved are Section 19(b) of the Securities Act of 1933 as amended and supplemented by Section 22 (b) of the said Act; Section 2 (1) of the Securities Act as amended in 1933; the Fourth Amendment to the Constitution of the United States.

The Securities and Exchange Act of 1933, Section 19(b), provides as follows:

> "(b) For the purpose of all investigations which, *in the opinion of the Commission*, are necessary and proper for the enforcement of this title, any member of the Commissioner or any officer or officers desig-

nated by it are empowered to administer oaths and affirmations, subpoena witnesses, take evidence and require the production of any books, papers or other documents *which the Commission deems relevant or material to the inquiry.* Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing." (Emphasis added.)

Opinion of the Ninth Circuit Court of Appeals is contained in the transcript of the record [R. 344]:

E.
Statement of the Case.

The Securities and Exchange Commission instituted an investigation of The Penfield Company of California, a California corporation, to determine whether certain warehouse receipts and bottling contracts for the bottling of whiskey were being handled by The Penfield Company of California and also whether it had in any way transacted sales of stock through the mails.

The Securities and Exchange Commission made two orders as follows:

The order of the Securities and Exchange Commission alleged as follows:

"The Commission, having considered the aforesaid report by members of the staff, and for the purpose of (1) determining whether the persons named in the caption of this Order have violated or are about to violate the provisions of Section 5(a) and 17(a) of the Securities Act of 1933; and (2) aiding in the enforcement of said Acts; deems it necessary and

appropriate that an investigation be made to determine whether said persons have engaged in the acts and practices set forth in paragraph II hereof or any acts or practices of similar purport or object."

In a supplemental order of the Securities and Exchange Commission the Commission alleges as follows:

"The Commission, having considered the aforesaid report by members of its staff, and for the purpose of (1) determining whether the companies and persons named in the caption hereof have violated or are about to violate the provisions of Sections 5(a) and 17(a) of the Securities Act of 1933; and (2) aiding in the enforcement of said Act; deems it necessary and appropriate that an investigation be made to determine whether the said companies and persons, or any of them, have engaged in the acts and practices set forth in paragraph III hereof, or any acts or practices of similar purport.

"It Is Ordered, pursuant to Section 20(a) of the Securities Act of 1933 that the order and supplemental order directing an investigation mentioned in paragraph I hereof be and it hereby is supplemented and amended to include for determination the matters set forth in paragraph V hereof.

"It Is Further Ordered, pursuant to the provisions of Section 19(b) of the Securities Act of 1933 that for the purpose of such investigation, William Green, C. J. Odenweller, Jr., Charles E. Greaney, Hiram C. McDade and Harold O. Schroeder, and each of them, is hereby designated an officer of the Commission and empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda or other records

deemed relevant or material to the inquiry, and to perform all other duties in connection therewith as authorized by law."

The Commission itself at no time made any order or finding as to what it deemed relevant or material to the inquiry as provided by Section 19(b) of the Securities and Exchange Act, nor did the Commission in any of its orders declare that "in the opinion of the Commission these things are necessary and proper for the enforcement of this title." Following these proceedings a subpoena *duces tecum* was issued [Exhibit "C"].

Subsequent to the issuance of these orders of the Commission a subpoena duces tecum was issued [Exhibit C, R. 15] directing A. W. Young, Secretary-Treasurer of The Penfield Company of California, *et al.*, 8900 West Beverly, Beverly Hills, Calif., to appear and produce twenty items set forth in the subpoena.

These items were:

1. Minute Book.
2. All stock certificate stub books and cancelled certificates of common and preferred stock.
3. Alphabetical list of stockholders and addresses (if not shown on stub books indicated in Item No. 2 above).
4. General Ledger.
5. Cash Book.
6. General journal.
7. Records reflecting the sale of whiskey and/or whiskey warehouse receipts by the corporation.

8. Records relating to the sale of bottling contracts of Bourbon Sales Corporation, Louisville, Kentucky, by the corporation.

9. Records relating to the sale of bottling contracts of The Penfield Company of California, by the corporation.

10. Correspondence files, including letters received from and copies of letters sent to, all stockholders of The Penfield Company of California.

11. Correspondence files containing letters received from, and copies of letters sent to, all persons to whom bottling contracts of Bourbon Sales connection with the sale of stock of The Penfield Company of California were sold.

12. All cancelled checks of the corporation.

13. Copies of confirmations or advices delivered in connections with the sale of stock of The Penfield Company of California or the sale of bottling contracts of Bourbon Sales Corporation, or The Penfield Company of California.

14. All original journal entries or journal vouchers supporting entries appearing in the general journal or cash books.

15. Copies of all prospectuses, sales material, sale letters, material in salesmen's kilts or similar documents used in connection with the solicitation and sale of stock in The Penfield Company of California.

16. Copies of all prospectuses, sales material, sales letters, material in salesman's kits or similar documents used in connection with the sale of bottling contracts of Bourbon Sales Corporation or The Penfield Company of California.

17. Purchase invoices or records supporting the acquisition of whiskey, whiskey warehouse receipts or bottling contracts by The Penfield Company of California from private individuals for cash or in exchange for stock, bottling contracts or other securities.

18. Purchase invoices or records supporting the acquisition of whiskey or whiskey warehouse receipts from distillers, whiskey warehouse receipts brokers or other persons or companies engaged in the whiskey business.

19. Sales invoices or records supporting the disposition of whiskey, whiskey warehouse receipts or bottling contracts procured from investors.

20. Employment or other records showing names of all employees, salesmen or other personnel with last known addresses.

Upon objections to their production the application was made to the District Court of the United States, which, after hearing, granted the order and stayed the execution of the appeal herein.

Grounds for Granting the Writ of Certiorari.

1. The District Court and Circuit Courts erred in holding that any investigator or employee of the Securities and Exchange Commission could himself issue a subpoena *duces tecum* and subpoena in all the books, papers, records, or other documents of a corporation, without the Commission itself making a finding that it deems them relevant and material.

If Congress had intended to have given the power of delegation to the Securities and Exchange Commission it would have been at no loss of words to say so, but the Congress, realizing the large number of corporations that could thus be subjected to a roving commission running riot, has strictly limited the power to subpoena books, papers and documents which the Commission deems relevant and material to the inquiry. The Fourth Amendment requires that before a search or a seizure can be made of books or papers that there be a finding of probable cause. There was none such in this case.

2. The District and Circuit Courts erred in holding that the Securities and Exchange Commission has any power to delegate of authority to issue subpoena *duces tecum*.

3. If it can be construed that the Securities and Exchange Commission can itself make an arbitrary finding as to what it deems *relevant and material*, such statute would itself be unconstitutional since the power to make that finding and the finding of reasonable and probable cause required by the Fourth Amendment can only be given to the courts under Article III of the Constitution.

4. The contract involved in these transactions and the transactions are not within the jurisdiction of the Securities and Exchange Commission as they are not within the term of investment contract defined by the Act.

5. Bottling contracts for whiskey are not contracts for a security, and therefore not within the scope of the Securities and Exchange Commission.

6. Where the contracts are matters relating to alcohol the scope of the Act is solely within the jurisdiction of the Alcohol Tax Unit.

7. The District Court erred in holding that each of the twenty items was within the scope and jurisdiction of the Securities Act giving the Commission power to investigate them and that the investigation was not far beyond the scope authorized by law.

Respectfuly submitted,

MORRIS LAVINE,

Attorney for the Penfield Company of California.